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No. 72-307

Supreme Court of the United States

October Term, 1972

ANTHONY JOSEPH RUSSO, JR. and DANIEL ELLSBERG,

Petitioners,

vs.

WM. MATTHEW BYRNE, JR., Judge of the United States District Court for the Central District of California,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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vs.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Anthony Joseph Russo, Jr. and Daniel Ellsberg petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

Opinions Below

The opinion of the Court of Appeals (App. A, *infra*, pp. 1a-3a) and the oral opinion of the district court (App. B, *infra*, pp. 4a-6a) have not been reported. The opinion of Mr. Justice Douglas granting a stay of the trial pending the petition for certiorari (App. C, *infra*, pp. 7a-9a) has not yet been reported.

Jurisdiction

On July 27, 1972 the Court of Appeals denied a petition for a writ of mandamus seeking to compel the respondent district judge to comply with the procedures laid down in *Alderman* v. *United States,* 394 U.S. 165, 182, *i.e.,* to determine the legality of the admitted electronic surveillance of the conversations of petitioners' attorneys and consultants and, if illegal, to disclose the surveillance logs and to conduct an adversary proceeding to determine relevance and taint. The judgment of the Court of Appeals, consisting of its opinion, is set forth in App. A, *infra,* pp. 1a-3c. On July 29, 1972, Mr. Justice Douglas stayed the trial herein pending the filing of this petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether the determination of the relevance of the wiretapped conversations of a defendant's attorneys and agents in a criminal case requires an adversary hearing under the Fourth, Fifth and Sixth Amendments to the Constitution.

2. Whether a district court's refusal to conduct such an adversary proceeding also violates the mandate of Congress as expressed in the Communications Act of 1934, the Omnibus Crime Control and Safe Streets Act of 1968, and the Organized Crime Control Act of 1970.

3. Whether a warrantless "foreign intelligence" interception is lawful, and, if so, whether the use of its fruits in criminal prosecutions violates the First, Fourth, Fifth and Sixth Amendments to the Constitution.

Statutes Involved

The constitutional provisions involved are the First, Fourth, Fifth and Sixth Amendments to the Constitution. The statutes involved are the Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. 605; the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 212-218, 222-3, 18 U.S.C. 2510-2520, and the Organized Crime Control Act of 1970, 84 Stat. 935, 18 U.S.C. 3504. The pertinent sections of the statutes are reproduced in Appendix "D", *infra*, pp. 10a-23a.

Statement of the Case

Petitioners were indicted in the United States District Court for the Central District of California for violations of 18 U.S.C. 371, 641, 793, relating to the multi-volume history of the United States' involvement in Vietnam, generally known as the Pentagon Papers. See *New York Times Co.* v. *United States*, 403 U.S. 713.

On January 24, 1972, during pre-trial proceedings, petitioners moved for discovery of electronic surveillance information with respect to the petitioners, their attorneys and legal consultants. On May 2, 1972 the district court, over government opposition, granted the motion and ordered the government to disclose electronic surveillance of any communications to which the petitioners or "the attorneys for the defendants or any of said attorneys' agents or employees were a party. . ." In lieu of compliance the government, nearly three weeks later, moved for reconsideration of that portion of the court order regarding attorneys and agents. The government's motion was denied by the trial court on June 20, 1972.

Thereafter, defense counsel repeatedly pressed the government in open court for compliance with the court's order of May 2, 1972. On June 30, 1972 the government

filed another motion opposing the district court's order requiring disclosure of surveillance of certain individuals listed by petitioners as attorneys and consultants. That motion also was denied following the petitioners' *in camera* submission respecting the duties of the listed consultants.

On July 3, 6 and 7, 1972, defense counsel again objected to the government's failure to comply with the court's order of May 2nd. On July 7, 1972, the court entered a written order reaffirming its order of May 2, 1972.

On July 10, 1972, the government filed an affidavit denying surveillance of the petitioners; the affidavit had been in its possession for over a month. On the morning of July 21, 1972, the jury was empanelled and sworn. At 4:26 p.m. of that day, after the close of court, the government filed an affidavit denying surveillance of the attorneys and their agents "except as may hereafter be disclosed to the Court *in camera*." But later that afternoon, without notice to the petitioners, the government submitted *in camera* a surveillance log on a member of the defense team. No notice of this submission was given to the petitioners, although it had been the uniform practice of both government and defense counsel on all prior occasions to give notice of *in camera* filings. Defense counsel was first informed of the electronic surveillance by the district judge during argument on July 24, 1972 while defense counsel was objecting that the government's affidavit was so vague that it was impossible to ascertain whether there had been any electronic surveillance.

Petitioners requested the identity of the persons surveilled, the turnover of the logs and an evidentiary hearing on relevance and taint. The district court denied the request, stating that the logs did not reveal any information relevant to the issues in the case (App. B, *infra*, pp. 4a-6a). Neither the government nor the district court disclosed the nature of the surveillance, *i.e.*, national security, foreign intelligence or otherwise.

Petitioners applied to the Court of Appeals for the Ninth Circuit for a writ of mandamus to compel the district judge to comply with this Court's decision in *Alderman* v. *United States, supra,* and secured a stay of the trial pending argument on the writ. The Court of Appeals after argument on the merits assumed *arguendo* "that had the intercepted conversations dealt with the pending prosecutions of these petitioners, *United States* v. *Seale, supra,* would support the order for disclosure sought by petitioners" (App. A, *infra,* p. 2a). It declined to direct discovery because "the District Court has determined that the intercepted conversation had no such relationship" *Ibid.* and it vacated the stay.

On July 28, 1972, Mr. Justice Douglas, sitting as Circuit Justice, heard oral argument upon petitioners' application for a further stay pending the filing of a petition for certiorari. In the course of argument the government stated for the first time that the wiretap was a "foreign intelligence" tap and that it was made, not pursuant to judicial order, but under an undisclosed authorization of the Attorney General. Mr. Justice Douglas granted a stay of the trial pending the filing of this petition on the ground that the application "presents a profoundly important constitutional question not squarely decided by the Supreme Court but ruled upon by the District Court and by the Court of Appeals in a way that is seemingly out of harmony with the import of our decisions." *Russo* v. *Byrne,* No. A-150 (Douglas, Circuit Justice, July 29, 1972) (App. C, *infra,* p. 7a). The government's motion to the full Court for a vacation of the stay was denied.

That motion had expressed the Solicitor General's opinion that a jury could not be kept "on leash" indefinitely and that the petitioners could plead double jeopardy to a trial before a new jury. While disagreeing with the Solicitor General's analysis, petitioners subsequently moved the district court for a mistrial and exe-

cuted a formal waiver of any claim to double jeopardy if the motion for a mistrial were granted and the occasion arose for the selection of a new jury.

Reasons for Granting the Writ

1. The decision below conflicts with this Court's decisions requiring, on constitutional grounds, that the determination of the relevance of wiretapped conversations be made in adversary proceedings.

This case followed by less than ninety days this Court's historic affirmance in *United States* v. *United States District Court*, — U.S. —, U.S.L. Week 4761 (June 20, 1972) of the principles laid down in *Alderman* v. *United States*, 394 U.S. 165, and raises questions of comparable concern for the integrity of the judicial process. For the first time in the long history of criminal litigation in this country, two defendants face criminal prosecution, knowing in advance of their trial by way of an admission by the government, that an attorney of record or a defense consultant, during the period of their employment by the defendants, has been overheard through electronic surveillance. The trial court's action foreclosing all further disclosure and consideration of the tap based solely on an *in camera ex parte* determination that the substance of the conversation was irrelevant to the case, action described by a Justice of this Court as "seemingly out of harmony" with the most recently established constitutional principles of this Court, resulted in an unprecedented stay of the proceedings affording petitioners an opportunity to apply to this Court for a review of ". . . a profoundly important constitutional question not squarely decided by the Supreme Court. . . ." *Russo* v. *Byrne, District Judge*, Supreme Court No. A-150, Douglas, Circuit Justice, July 29, 1972 (App. C, *infra*, p. 7a).

Alderman held that the relevance of illegally tapped conversations should not be decided *in camera* and *ex parte* by the trial judge. Rather, the issue of the nexus of the tapped conversation to the case must be litigated in adversary proceedings following disclosure of the logs of the surveillance.

It will be recalled that in *Alderman* the government conceded that all overhearings "arguably relevant" should be tested by adversary proceedings and it contended only that a preliminary determination of arguable relevance should be made by the trial judge *in camera*. But even this position, characterized in the Court's opinion as a "modest proposal", was rejected by the Court because "[t]he task [of determining arguable relevance] is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court to identify those records which might have contributed to the government's case" *Alderman* v. *United States*, *supra*, p. 182 (footnote omitted).

Contemporaneous interpretation of *Alderman* has made it equally clear that not all issues relating to electronic surveillance need be decided in adversary proceedings. The determination of the relevance of overheard conversations requires adversary proceedings because confident resolution of the issue requires an intimacy with the facts and personalities of the case which no court possesses without the special knowledge of the parties:

> "An apparently innocent phrase, a chance remark, a reference to what appears to be a neutral person or event, the identity of a caller or the individual on the other end of the telephone, or even the manner of speaking or using words may have special significance to one who knows the facts in an accused's life." *Alderman* v. *United States*, *Ibid.*

By contrast, a more mechanistic judgment may be made by the trial court *in camera;* for example, double-checking the government's voice identifications, *Taglianetti* v. *United*

States, 394 U.S. 316. (On the other hand, the lawfulness of an order authorizing the surveillance may require an adversary proceeding where the legality of the search warrant or the sufficiency of the Attorney General's affidavit is at issue. *Cf. Giardano* v. *United States*, 394 U.S. 310, 319 (Stewart, *J.*, concurring opinion) with *United States* v. *United States District Court, supra* at 4774-4776 (White, J., concurring opinion)).

Thus, the test of *Alderman* is a functional one: choice of the appropriate procedure, adversary or *ex parte in camera*, depends upon the nature of the particular issue, with determinations of relevance, even of "arguable relevance", the prototypical example requiring disclosure and adversary proceedings. *United States* v. *United States District Court, supra.*

In the instant case, notwithstanding the clear mandate of *Alderman*, the trial court examined the content of the logs *in camera* and *ex parte* and ruled that the overheard conversations of a member of the defense camp were not relevant to the case. Based upon such determination, the court reasoned that neither the Fourth nor the Sixth Amendment rights of the petitioners were violated. Hence, it held that they lacked standing to question the legality of the tap and, if illegal, to compel disclosure and suppression. The court below affirmed.

The threat posed by this reasoning to the efficacy of *Alderman* and its progeny should be immediately apparent. An adversary hearing on relevance is the last stage of the procedural course charted by *Alderman*: the trial court is to determine, first, the existence of any surveillance of which the defendant has standing to inquire; second, the legality of such surveillance; and, third, in adversary proceedings, the relevance of such surveillance. By casting the issue of relevance as a problem of standing, the district court has advanced last for first, and has short-circuited all other stages including the adversary determination of relevance.

Moreover, the evaluative function of the trial judge in determining "standing" and thus foreclosing an adversary determination of relevance was identical with that of the trial judge's determination of "arguable relevance" which this Court rejected in *Alderman*. In examining the logs to determine if the attorney's conversations related to this case, the trial court engaged in the same mental process, examined the same qualitative evidence, operated under the same inadequacies, and ran the same impermissible risks.

As the first Justice of the Court to review the record observed: "*Alderman* would be greatly undercut if the issue of relevancy could be resolved *in camera* and the trial court ruled against the defendants on the merits and then determined they had no 'standing' to complain." *Russo* v. *Byrne*, App. C, *infra*, p. 8a. Since the issue of standing is congruent to the issue of relevance, the district court should have followed the Seventh Circuit's admonition:

> "Without a fair opportunity to prove standing, the right to the opportunity to show a tainted trial, announced in *Alderman*—is a right without value, for what the Supreme Court in *Alderman* said with respect to the inadequacy of a solely *in camera* inspection with respect to arguable relevance of eavesdropping applies as well to the question of a meaningful opportunity for establishing standing." *United States* v. *Fannon*, 435 F. 2d 364, 367 n.2 (7th Cir. 1970).

This is consistent with this Court's more liberalized approach to standing in recent years. See, *e.g.*, *Flast* v. *Cohen*, 392 U.S. 83; *NAACP* v. *Alabama*, 357 U.S. 201; *Barrows* v. *Jackson*, 346 U.S. 249; *Combs* v. *United States*, U.S. , 40 U.S.L. Week 4917 (June 26, 1972). It also follows the Court's practice in appropriate cases of postponing the determination of the threshold issue of standing until there is an opportunity for adequate consideration of the congruent issue of the merits. See, *e.g.*, *Parmelee Transp. Co.* v. *Atchison, T & S.F.R. Co.*, 353 U.S. 971; *Cramp* v. *Board of Public Instruction*, 366 U.S. 934; *In re Groban*, 351 U.S. 903.

More particularly, the relationship between defendant and counsel in a criminal case is one of those "special circumstances" referred to in *Alderman, supra* at 174, calling for a broad conception of standing in Fourth Amendment cases. It has been applied in cases where the connection was far more tenuous, see *Jones* v. *United States,* 362 U. S. 257, 261; *United States* v. *Jeffers,* 342 U. S. 48, than the attorney-client relationship whose "confidentiality must continue to receive unceasing protection." *Lanza* v. *New York,* 370 U. S. 139, 144; see *Hickman* v. *Taylor,* 329 U.S. 495. The relationship has been eloquently described in an American Bar Association study:

> "Against a 'hostile world' the accused, called to the bar of justice by his government, finds in his counsel a single voice on which he must be able to rely with confidence that his interests will be protected to the fullest extent consistent with the rules of procedure and the standards of professional conduct."

American Bar Association Standards Relating to the Prosecution Function and the Defense Function (Approved Draft 1971) p. 146.

The defense lawyer who was the subject of the tap also has an independent standing to raise Fourth, Fifth and Sixth Amendment claims with respect to litigation in which he is under a duty to protect his client's interests as well as his own. See, *e.g., In re Turkeltoub,* 256 F. Supp. 683 (S.D.N.Y. 1966). Knowing that his conversations have been surveilled and may continue to be so, but ignorant of the details, he may well conclude that he cannot offer the effective assistance of counsel required by his retainer, the Canons of Ethics, Nos. 4 and 7, and the Sixth Amendment. The discovery motion in his client's name gives him the only significant opportunity to ascertain the relevant facts, including the nexus between conversation and legal representation, and to decide jointly with his client on the continuance *vel non* of the relationship.

In this context the Court of Appeals' concern for the possible intrusion "upon the protected relationship of some third party" (App. A, *infra*, p. 3a) is misplaced. It is the same argument made by the Solicitor General and overruled by the Court in *Alderman, supra*, at 168, 184. The government, which has already pried into the petitioners' attorneys' affairs, is in no position to contest the joint attorneys'-defendants' request for revelations that may bear upon this case.

Thus, this case involves more than the violation of Fourth Amendment rights against search and seizure which were the subject of the Court's decision in *Alderman, supra*. It is also concerned with the Fifth and Sixth Amendment rights to due process, a fair trial, and the effective assistance of counsel. For the overheard conversation was that of either an attorney of record or a legal consultant to the defense, intercepted since his retention by the defendants during that period of time described by this Court as ". . perhaps the most critical period of the proceedings ... from the time of arraignment until the beginning of ... trial, when consultations, thoroughgoing investigation and preparation [are] vitally important. . ." *Powell* v. *Alabama*, 287 U.S. 45, 57.[1]

During the preparatory stage when "privacy is so vital", *In re Turkeltoub, supra*, this Court has erected a virtual constitutional shield around the councils of the

[1] The effect of this disclosure on the petitioners and their attorneys on the eve of the trial was exacerbated by the inexplicable and unprecedented refusal of the government to disclose the identity of the party overheard and the accompanying failure of the trial court to compel such disclosure, leaving all on the councils of the defense with the anxious knowledge that someone was overheard without knowing precisely whom. See *In re Turkeltoub, supra* at 684 where the court cautions against practices which might have a "slightly chilling impact upon counsel for defendants in criminal cases . . ." and impair the "lawyer's effective representation of his client," citing *Hickman* v. *Taylor*, 329 U.S. at 514-515.

defense, not only to protect the private interests of the accused but also to safeguard the overriding interest of the community in the integrity of the adversary criminal process. *Hickman* v. *Taylor, supra,* at 515; *O'Brien* v. *United States,* 386 U.S. 345; *Black* v. *United States,* 385 U.S. 26; see also *Caldwell* v. *United States,* 205 F. 2d 879 (D.C. Cir. 1953); *Coplon* v. *United States,* 191 F. 2d 749 (D.C. Cir. 1951), *cert. den.* 342 U.S. 926. No surreptitious piercing of the councils of the defense are countenanced, particularly by the "uninvited ear" of government through means of electronic surveillance. See *Katz* v. *United States,* 389 U.S. 347, 352. Thus, even the most innocuous information, such as an overheard conversation between attorney and client respecting travel restrictions in a bail bond, not communicated to the prosecuting attorney, will vitiate the entire trial. *O'Brien* v. *United States, supra.*

The qualitative difference between the information obtained by an overhearing of the defendant as opposed to that of his counsel also contributes to the greater sensitivity demonstrated where the lawyer is overheard. The most delicate considerations of trial strategy and tactics, not traceable to evidentiary leads, may be invaded in such overhearings. As observed by Circuit Judge Coffin, in these instances, the "real nemesis" lies in:

> "subtle benefits that might consciously or unconsciously accrue to the government in knowing the planned procedure, or even the state of mind of the defendant and his counsel *with respect to the trial,* quite apart from hearing affirmative evidence, or leads to evidence." *Taglianetti* v. *United States,* 398 F.2d 558, 570 (1st Cir. 1968), *aff'd* 394 U.S. 316.

The present case which intimately concerns the history of the Indochina War is both one in which international communications are necessary for defense purposes and in which their interception might give substantial benefit to the government.

The foregoing considerations have additional weight because of the effect upon the First Amendment freedoms of belief, speech and association of the electronic surveillance of American citizens, whether lawyers or their clients. The Court has recognized these factors in overruling the government's claims of an inherent executive wiretap power for reasons of national security. *United States* v. *United States District Court, supra*, at 40 U.S.L. Week 4766, 4768-9. The same factors give added justification to the petitioners' claim of right to an adversary proceeding in this case where the wiretap is allegedly for "foreign intelligence" purposes.

2. The decision below conflicts with the mandate of Congress as set forth in 18 U.S.C. 2510-2520, 3504 and 47 U.S.C. 605.

The refusal of the courts below to compel discovery and to conduct an adversary hearing appears also to conflict with the provisions of the two recent wiretapping statutes, the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510-20; 82 Stat. 212-223) and the Organized Crime Control Act of 1970 (18 U.S.C. 3504; 84 Stat. 922, 935, *infra*), implementing the Communications Act of 1934, (47 U.S.C. 605, 48 Stat. 1103) as interpreted and applied by this Court.

The first of these statutes appears to incorporate the procedures mandated by *Alderman*. See *Gelbard* v. *United States*, — U.S. —, 40 U.S.L. Week 4862 (June 26, 1972); Mr. Justice White concurring in *United States* v. *United States District Court, supra*, at 40 U.S.L. Week at 4772.

The second statute gives further protection to a defendant by requiring the government to "affirm or deny" the existence of wiretapping upon the demand of an aggrieved party (18 U.S.C. 3504(a)(1)) such as the petitioners under the trial court's disclosure order.

The government's response in this case, *supra*, page 4, was a deceptive evasion of this statutory duty. In the *United States District Court* case, *supra*, where the government filed an affidavit purporting to set forth the authority for the tap, Mr. Justice White, concurring at p. 4774, concluded that the inadequacy of the Attorney General's affidavit made "the surveillance conducted by the Government in this case . . . illegal . . . under the statute itself . . .". *A fortiori* here where no assertion of authority was revealed to petitioners.

3. The case also presents the important constitutional question expressly left open by this Court as to the lawfulness and effect of wiretapping for "foreign intelligence" purposes.

The case comes to the Court with the government's claim before Mr. Justice Douglas that it involves a "foreign intelligence" tap—a claim not previously made in or, as a consequence of the district court's decision on "standing", adjudicated by the courts below.

A "foreign intelligence" tap is a term whose vagueness the government has admitted previously [2] and in this case (see App. C, *infra*, pp. 7a-8a). In the *United States District Court* case, *supra*, the government described the "distinction" between domestic security and foreign intelligence taps as unsupported "both on the facts of this case and in most (if not all) national security cases within the congressionally defined areas of concern" [3] This Court's decision in that case that warrantless internal security taps violated the Fourth Amendment expressly left the issue open with respect to so-called "foreign intelligence taps" *Supra* at 4769; see also Mr. Justice Stewart's con-

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[2] ". . . the line between domestic activity and foreign intelligence is often blurred, or merged." Govt. Pet. for Cert., p. 8, *United States* v. *United States District Court*, *supra*.

[3] Brief for the United States, pp. 30-31 (footnote omitted).

curring opinion in *Giordano* v. *United States*, 394 U.S. 310, 314 and cases cited. The question is obviously an important one calling for plenary consideration by this Court.

Such an adjudication is particularly appropriate here because the lower court's failure to make a finding was due to the government's deception, *supra*, p. 4, and to the district court's error in blocking further inquiry by its ruling on "standing". The issue is exclusively one of law which can be presently adjudicated upon the government's claim that the tap is in the field of foreign intelligence—a claim which we have no doubt was made in good faith and by which it will stand. Further, as noted above, this is precisely the kind of case in which preparation by counsel is likely to involve international communications intercepted by the government. Since no foreign intelligence record will ever present more facts than the Attorney General's present claim, this most important issue should now be considered by the Court.

The government's claim of inherent executive power to wiretap and use it in criminal proceedings violates the Constitution in several respects. First, such a claim is contrary to our system of limited governmental powers and to the law-making power as set forth in Article I, § 1 of the Constitution and has been rejected by the Court where important liberties are involved, *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579; *Kent* v. *Dulles*, 357 U.S. 116. Even the government while unsuccessfully insisting upon the right to wiretap without warrant in an internal security case has conceded that "[o]nce that surveillance has been made, the courts may review it to determine its conformity with the standard of the Fourth Amendment . . ."[4]

Second, even assuming that upon plenary consideration of the issues the Court were to conclude that it was

[4] Brief for the United States, p. 21 in *United States* v. *United States District Court*, *supra*.

in no position to control so-called foreign intelligence tapping for reasons of executive privilege, state secrets, or otherwise, that does not foreclose petitioners' objections on constitutional grounds to the use of the wiretapping materials against them in a criminal prosecution. The existence of a power for special emergency purposes does not constitutionally support its exercise or, as here, its extension, in other circumstances. See *Anderson* v. *Dunn, 6 Wheat 204-231.* The distinction, upon statutory grounds, between the power to wiretap and the right to use its fruits is suggested also by Mr. Justice White in his concurring opinion in *United States* v. *United States District Court, supra,* at 4775.

In a strikingly similar case, the government successfully withheld from the defense the results of wiretapping engaged in to combat *foreign* espionage, but at the cost of dismissing the prosecution of a defendant who as here asserted her Sixth Amendment right to confrontation. *Coplon* v. *United States,* 185 F.2d 629, 638, *cert. den. sub. nom., United States* v. *Coplon,* 342 U.S. 920. As Chief Judge Learned Hand said:

> "[t]he prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such 'state secrets' as might be relevant to the defense."

This view was adopted by the Court in *Alderman, supra* at 184, two decades later where Mr. Justice White wrote with respect to the Fourth Amendment rights involved: "It may be that the prospect of disclosures will compel the government to dismiss some prosecutions in deference to national security or third party interests."

In short, if wiretapping for intelligence purposes may be engaged in without warrant, consistent with the Fourth Amendment, its additional use for non-intelligence purposes, specifically for criminal prosecutions, is subject to Fourth, Fifth and Sixth Amendment limitations.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari issue to review the judgment and opinion of the court below.

Respectfully submitted,

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August 21, 1972

APPENDIX A

(Opinion and Judgment of the Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY JOSEPH RUSSO, JR., and DANIEL ELLSBERG,

Petitioners,

against

HON. WILLIAM MATTHEW BYRNE, JR., United States District Judge for the Central District of California,

Respondent.

On Appeal from the United States District Court for the Central District of California

Before:

MERRILL, KOELSCH and TRASK, Circuit Judges.

Per Curiam:

Petitioners are charged with federal criminal offenses and trial is pending in the Central District of California. In pre-trial proceedings the District Court ordered that the government disclose *in camera* any interception of wire or oral communications to which defendant's attorneys, or employees determined by the court to be bona fide defense consultants, were parties.

Pursuant to that order the government disclosed *in camera* interception of a single telephone call from a place at which the government had installed an instrument of electronic surveillance to one of the attorneys or defense consultants. The court, after *in camera* examination of the disclosure, ruled that defendants were without standing to

request disclosure because the intercepted conversation "was utterly without significance or relation to this case" and could not "conceivably come within the client-attorney privilege." Defendants, as petitioners in these proceedings, then sought a writ of mandamus from this court requiring the respondent District Judge to require the government to disclose the name or names of the person or persons who were subject to the surveillance and the contents of the intercepted communications and to order a pretrial hearing to determine whether the interception was illegal and, if so, to determine whether the interception tainted the prosecution's case.

Relying on *United States* v. *Seale*, ... F.2d ..... (7 Cir. May 11, 1972), petitioners contend that eavesdropping on an attorney or defense consultant constitutes a sufficiently direct intrusion into the attorney-client relationship to give them standing to complain that their Sixth Amendment right to assistance of counsel may have been disturbed. Relying on *Alderman* v. *United States*, 394 U.S. 165 (1969) they contend that with such standing they are entitled to disclosure and a hearing to determine whether the intercepted conversation taints the prosecution's case.

We assume, *arguendo*, that had the intercepted conversation dealt with the pending prosecutions of these petitioners, *United States* v. *Seale*, *supra*, would support the order for disclosure sought by petitioners. The difficulty is that the District Court has determined that the intercepted conversation had no such relationship. Petitioners here contend that for reasons of policy it must be presumed to relate to their cases; that when conversations of their attorneys or consultants have been intercepted they have standing *per se to* require disclosure; that the question whether the conversation relates to their cases is not such a question as should be resolved by the court *in camera* but that it should be determined only after disclosure and after they have had the opportunity to be heard upon the question.

We cannot agree. Sixth Amendment rights do not confer standing upon a client to pry into all his attorney's business, whether it relates to his case or not. For these petitioners to have standing it is necessary that the interception intrude upon *their* relationship with their attorney or consultant. It is for the court *in camera* to determine whether such is the case. *Taglianetti* v. *United States*, 394 U.S. 316 (1969).[1]

Writ denied. The stay heretofore granted by this court is vacated.

/s/ Charles M. Merrill

/s/ M. Oliver Koelsch

/s/ Ozell M. Trask
Circuit Judges

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[1] As one reason for application of the rule to the facts of this case we note that to air the intercepted conversation for all to argue about might well intrude upon the protected relationship of some third party.

APPENDIX B

(Oral Opinion of the District Court)

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE WM. MATTHEW BYRNE, JR., Judge Presiding

No. 9373-CD-WMB

UNITED STATES OF AMERICA,

Plaintiff,

against

ANTHONY JOSEPH RUSSO, JR., DANIEL ELLSBERG,

Defendants.

The Court:

All right, before I call the jurors in, what I intend to do, I will give my ruling on the electronic surveillance now. I will then call in the jurors that I am going to give the final concluding instructions to. Then we will call all the jurors in and exercise your peremptories.

All right, as far as the motion for the electronic surveillance that was presented yesterday, I find that, in order for the defendants to have standing to challenge the government's surveillance, there must have been surveillance in violation of either the defendants' Fourth Amendment rights against unreasonable searches or in violation of their Sixth Amendment rights to counsel.

Relating back now to the first affidavits that were filed by the government, I find from an examination of the government affidavits of July 8, 1972, and July 10, 1972, that there was no surveillance of the defendants; there

was no surveillance of the premises or premises where they had an expectation of privacy, those listed in the order of July 7, 1972, nor was there any surveillance of any conversation to which either of the defendants were a party.

Therefore, there was no surveillance in violation of the defendants' Fourth Amendment rights.

If the defendants have standing to object to the government's surveillance, it would have to be under the Sixth Amendment right to counsel, and that was the matter that we discussed and argued yesterday.

The government affidavit of July 21, 1972, advises that there has been no electronic surveillance directed at any individual named in the order, any individual lawyer or consultant named in the order; nor has there been any electronic surveillance conducted at any of the places that were named in the order.

The question thus arises on the attorney-client privilege because one of the persons named in the order was a recipient of a communication from an installation under surveillance.

Under the authority of *Giordano* v. *United States* and *Taglianetti* v. *United States,* both Supreme Court cases decided after Alderman, and also on the authority of Kane and Clay, Fifth Circuit cases, it is appropriate for the Court to make an *in camera* inspection to determine standing to challenge government surveillance. The defendants have standing if, and only if, the intercepted communication is within the attorney-client privilege.

I have examined the government's affidavit of July 21, 1972, and I have examined the government's *in camera* filing of the intercepted statement. I find that the statement intercepted on a single date in question regards an event that is utterly without significance or relation in any way to this case. Nothing said in the intercepted com-

munication could conceivably come within the attorney-client privilege.

Therefore, there has been no interception of any communication falling within the attorney-client privilege, and I find that the defendants lack standing to challenge the government surveillance under the Sixth Amendment.

The motion for a pretrial hearing is denied.

Because it may be of some subsequent relevance, in order to make the record complete to give the defendants every benefit should appeal be necessary, I order the government to provide *in camera* an affidavit reciting the authority or authorization of the surveillance by the government on the date specified in the government's *in camera* filing of July 21, 1972, that order again being in compliance with similar orders in the *District Court* case and also in *Giordano* and I believe also in *Taglianetti*.

APPENDIX C

(Opinion of Circuit Justice)

SUPREME COURT OF THE UNITED STATES

No. A-150

Application for Stay.

ANTHONY JOSEPH RUSSO, JR., and DANIEL ELLSBERG,

Applicants,

WILLIAM MATTHEW BYRNE, JR.,

Judge of the United States District Court for the Central District of California.

[July 29, 1972]

MR. JUSTICE DOUGLAS, *Circuit Justice.*

The question raised by this application for stay presents a profoundly important constitutional question not squarely decided by the Supreme Court but ruled upon by the District Court and by the Court of Appeals in a way that is seemingly out of harmony with the import of our decisions.

The electronic surveillance used by the government was represented to me on oral argument as being in the "foreign" field. No warrant, as required by the Fourth Amendment, and by our decisions, was obtained, only the authorization by the Attorney General. Such authorization was held insufficient in our recent decision in *United States* v. *United States District Court for the Eastern District of Michigan*,—U.S.—(1972). It is argued that that case involved "domestic" surveillance but the Fourth Amendment and our prior decisions, to date at least, draw no distinction between "foreign" and "domes-

tic" surveillance. Whether such a distinction will eventually be made is for the Court, not for me, to make. Moreover, in light of the casual way in which "foreign" as distinguished from "domestic" surveillance was used on oral argument it may be that we are dealing only with a question of semantics. Defendants' telephonic communications, it seems, were not tapped, nor were those of their attorney or consultants. But a conversation or several conversations of counsel for defendants were intercepted.

The District Court in an *in camera* proceeding ruled that those conversations were not relevant to any issues in the present trial. The Court of Appeals, as I read its opinion, ruled that the defendants—*i.e.*, petitioners who make this application—have no "standing" to raise the question. If, however, the interceptions were "relevant" to the trial, it would seem they would have "standing."

Therefore it would seem to follow from the reasoning of the Court of Appeals that whether or not there was "standing" would turn on the merits. The case, viewed in that posture, would seem to require an adversary hearing on the issue of relevancy. We held, in *Alderman* v. *United States*, 394 U. S. 165, 182 (1968), that the issue of relevancy should not be resolved *in camera*, but in an adversary proceeding. *Alderman* would be greatly undercut if the issue of relevancy could be resolved *in camera*, and if the trial court ruled against the defendants on the merits and then determined they had no "standing" to complain.

I seriously doubt if the ruling of the Court of Appeals on "standing" accurately states the law. In modern times the "standing" of persons or parties to raise issues has been greatly liberalized. Our Court has not squarely ruled on the precise issue here involved. But it did rule in *Flast* v. *Cohen*, 392 U. S. 83, 103 (1967), that one who complains of a violation of a First Amendment right has

"standing." On oral argument *Flast* was distinguished from the present one on the ground that under the Fourth Amendment only those whose premises have been invaded or whose conversations have been intercepted have standing to complain of unconsitutional searches and seizures. That contention, however, does not dispose of this case.

The constitutional right earnestly pressed here is the right to counsel guaranteed by the Sixth Amendment. That guarantee obviously involves the right to keep the confidences of the client from the ear of the government, which these days seeks to learn more and more of the affairs of men. The constitutional right of the client of course extends only to his case, not to the other concerns of his attorney. But unless he can be granted "standing" to determine whether his confidences have been disclosed to the powerful electronic ear of the government, the constitutional fences protective of privacy are broken down.

My authority is to grant or deny a stay, not to determine whether the Court of Appeals is right or wrong on the merits. If the application presents frivolous questions it should be denied. If it tenders a ruling out of harmony with our prior decisions or questions or transcending public importance, or issues which would likely induce this Court to grant certiorari, the stay should be granted.

I am exceedingly reluctant to grant a stay where the case in a federal court is barely underway. But conscientious regard for basic constitutional rights guaranteed by the Fourth and Sixth Amendments makes it my duty to do so.

If the law under which we live and which controls every federal trial in the land is the Constitution and the Bill of Rights, the prosecution, as well as the accused, must submit to that law.

APPENDIX D

(Statutes Involved)

The Communications Act of 1934 provides in pertinent part (48 Stat. 1103, 47 U.S.C. 605):

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena* issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for

* As in original.

his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103.

The Omnibus Crime Control and Safe Streets Act of 1968, provides in pertinent part (82 Stat. 212, 18 U.S.C. 2510-2520):

§ 2510. Definitions.

* * *

(5) "electronic, mechanical, or other device" means any device or ~~apparatus which~~ can be used to intercept a wire or oral communication other than—

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal:

* * *

§ 2511. Interception and disclosure of wire or oral communications prohibited.

Appendix D

(1) Except as otherwise specifically provided in this chapter any person who—

(a) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication;

(b) willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when—

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States:

(c) willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * *

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the

foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

• • •

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications.

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2516. Authorization for interception of wire or oral communications.

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the appplication is made, when such interception may provide or has provided evidence of—

(a) any offense punishable . . . under the following chapters of this title: chapter 37 (relating to espionage). . . .

• • •

Appendix D

§ 2518. Procedure for interception of wire or oral communications.

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has

been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communica-

tion for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities

characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying

judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

* * *

§ 2520. Recovery of civil damages authorized

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred.

A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter.

The Organized Crime Control Act of 1970 provides in pertinent part (84 Stat. 935, 18 U.S.C. 3504):

Litigation concerning sources of evidence.

(a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act;

• • •

(b) As used in this section "unlawful act" means any act the use of any electronic, mechanical, or other device (as defined in section 2510(5) of this title) in violation of the Constitution or laws of the United States or any regulation or standard promulgated pursuant thereto.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-307

ANTHONY JOSEPH RUSSO, JR. AND DANIEL ELLSBERG, PETITIONERS

v.

WM. MATTHEW BYRNE, JR., JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A), of the district court (Pet. App. B), and of Mr. Justice Douglas (staying petitioners' trial pending their petition for certiorari) (Pet. App. C) are not reported.

JURISDICTION

The judgment of the court of appeals denying the petition for a writ of mandamus was entered on July 27, 1972. The petition for a writ of certiorari was filed on August 23, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the extraordinary writ of mandamus should have been granted to provide appellate review of an interlocutory order denying a defense discovery motion, when (1) the jury had been sworn, (2) the request for extraordinary review interrupted the criminal trial, (3) the district court had found the requested information utterly unrelated to the case or to any of the defendants' constitutional rights, and (4) there was no reason why review could not await appeal from the final judgment, if there were a conviction.

2. Whether the trial judge, on the facts of this case, followed acceptable procedure in determining *ex parte* and *in camera* that the overhearing of a single conversation of a defense lawyer or consultant in the course of a foreign intelligence electronic surveillance not directed at petitioners or their lawyers or consultants was utterly unrelated to petitioners' Fourth Amendment rights, to their attorney-client relationships, or to this case, and thus that disclosure was not warranted.

STATEMENT

Under an indictment filed in the United States District Court for the Central District of California on December 29, 1971, petitioners were charged with misappropriation of government property, improper disclosure of defense information, and conspiracy, in violation of 18 U.S.C. 641, 793 and 371.[1] The charges

[1] A prior indictment naming only petitioner Ellsberg, which the present indictment superseded, had been returned on June 28, 1971.

relate to the obtaining and disclosing of classified documents relating to the Vietnam conflict, known as the Pentagon Papers. After extensive pretrial proceedings, a jury was empanelled and sworn on July 21, 1972. The trial was then stayed by the Court of Appeals for the Ninth Circuit on July 25, 1972, while petitioners sought a writ of mandamus to review a ruling of the district court which found that a conversation of one of the "defense team" (a lawyer or consultant), which had been intercepted during the course of a foreign intelligence surveillance, involved "an event that is utterly without significance or relation in any way to this case" (Pet. App. B 5a). Although the court of appeals unanimously agreed with this finding and refused to grant mandamus, resumption of the trial has been stayed since then pursuant to an order of Mr. Justice Douglas issued on July 29, 1972.

1. The relevant facts are these. On May 2, 1972, the trial court heard oral argument and granted petitioners' motion for an order requiring the government to disclose to them the logs of any electronic surveillance of any conversation to which either petitioner was a party. It further ordered the disclosure to the court *in camera* of the logs of any surveillance of any attorney of record for the petitioners or of certain agents or employees of the attorneys (Tr. 131).[2] The possibility of *in camera* disclosure was suggested by

[2] "Tr." refers to the transcript of the pretrial proceedings in the district court beginning on May 2, 1972.

petitioners' counsel (Tr. 134).[3] The district court, however, instructed the government to await the entry of a written order before making the necessary file search because of anticipated differences between the oral announcement and the written order (Tr. 142).

On May 22, 1972, prior to the entry of the written discovery order, the government filed a sworn affidavit, executed by its chief trial counsel, stating that he was not aware of any electronic surveillance of any of the defense attorneys or any of their employees or agents. On this basis, the government also asked the district court to modify its previous oral order requiring a search of government records to determine whether any conversations of attorneys, agents, or employees had been obtained as a result of electronic surveillance.

The motion was heard by the trial court on June 20, 1972, when the court was orally advised that the search of government surveillance records required with respect to the petitioners was complete, and that the results were negative (Tr. 670). The government pointed out that the previous order set no date limitation on the period of required search for possible overhearings of attorneys or their agents or employees (Tr. 662). The court was also advised that the defense had not yet identified the employees or agents they believed should be covered (Tr. 665–669), and the court directed the defense to file a document listing the names and addresses and duties of the employees

[3] During the discussion of the procedure to be followed in the event any conversations were found to have been monitored, petitioner's counsel advised the court (Tr. 134): "I believe there is one case that allows for an in camera inspection by the Court."

and agents, and the dates of commencement of each relationship, so that the government could contest inclusion of particular names in the written order that was to be entered (Tr. 690–691).[4]

On June 27, the defense submitted its list, but the list filed at that time did not include a statement of the functions of the employees or agents or the dates of their association with the case, as the district court had required. Ruling on June 29, 1972, that petitioners had not complied with his order to submit appropriate information, the court commented: "I can't complete the order until I have the names and times" (Tr. 1641). By July 6, 1972, a written statement of the duties of the agents or employees still had not been submitted, and at that time the district court allowed the defense to state orally the nature of the employees' functions (Tr. 1998–2000). The district court's written order, issued the next day, specified the persons, places and dates required to be covered by the government's search for possible electronic surveillance of defense attorneys, employees, or agents. The court also ordered that the results of the search be filed by July 21, 1972. The order required the government to search the files of eight federal agencies for records of possible overhearings, during as much as the prior nineteen months, of sixteen individuals, using twenty-six addresses, and involving more than forty telephones.

[4] The district court later refused to include several attorneys petitioners listed when the order was entered (Tr. 1717–1719).

On July 21, 1972, as directed, a sworn affidavit was filed by the chief government attorney. The affidavit stated that the file search had been made and that (1) there had been no electronic surveillance directed at the listed individuals, (2) there had been no surveillance at the listed premises, and (3) there had been no overhearing of the oral or wire communications of any of the listed persons "except as may hereafter be disclosed to the Court *in camera* pursuant to the Court's order of May 2" providing for *in camera* disclosure. Later that day the government filed with the court *in camera* the log of a single overhearing of a conversation involving one of the listed persons as the result of a call made from a place under surveillance.

Petitioners moved for disclosure of this log. On July 25, 1972, the district court, after examining the log *in camera,* denied disclosure of the log and declined to permit a pretrial adversary hearing on its possible relevance to the case. It held that the intercepted conversation "regards an event that is utterly without significance or relation in any way to this case" and "[N]othing said in the intercepted communication could conceivably come within the attorney-client privilege." (Pet. App. B 5a–6a.)

2. While the various motions were being filed, argued, and decided, the long process of selecting a jury continued. By July 21, the jury had been selected and sworn, and opening statements to the jury were scheduled for July 26. Petitioners nevertheless applied to the court of appeals for a writ of mandamus pursuant to 28 U.S.C. 1651(a) to review the district court's

order, and on July 26 obtained a stay of the trial. A hearing was held by the court of appeals on July 26, and the court unanimously denied the writ on July 27, vacating the stay (Pet. App. A). Thereafter, an application for a stay was made to Mr. Justice Douglas as Circuit Justice, and on July 29, 1972, he granted a stay of the trial pending disposition of a petition for certiorari (Pet. App. C). The government's application to the full Court to vacate the stay was denied on August 5, 1972. This criminal trial, already begun by the swearing of the jury, has remained in suspension since late July while petitioners seek review of the denial of their discovery motion.

ARGUMENT

Petitioners now seek further appellate review of an order of the district court, entered after the commencement of their criminal trial, which determined that a single overhearing of a lawyer or consultant in the course of a foreign intelligence surveillance was utterly unrelated to the attorney-client relationship or to any other constitutional rights of petitioners and could not possibly taint the evidence to be adduced by the government in this case. The court of appeals has agreed that the overhearing could not conceivably have any relationship to petitioners, in refusing to issue a writ of mandamus to grant them access to the log and a hearing on its relevance. Petitioners' principal claim is that the trial judge erred in the procedure he followed in making that determination. But this claim—to the extent it does not become moot as a consequence of further trial proceedings—should not be subject to

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review in what is actually an interlocutory appeal in a criminal case.[5]

1. The law is settled that "[t]he correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." *Cobbledick* v. *United States*, 309 U.S. 323, 325–326; *Cogen* v. *United States*, 278 U.S. 221; cf. *Will* v. *United States*, 389 U.S. 90, 96.

The requirement of finality as a condition of review "is an historic characteristic of federal appellate procedure" and "has been departed from only when observance of it would practically defeat the right to review at all." *Cobbledick* v. *United States*, *supra*, 309 U.S. at 324–325. As Mr. Justice Frankfurter wrote for a unanimous Court in *Cobbledick*, 309 U.S. at 325:

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[5] The petition also seeks to raise a question that is in no sense properly presented by this record. Petitioners urge the Court to consider the question expressly left open in *United States* v. *United States District Court*, 407 U.S. 297, whether electronic surveillance in foreign intelligence collection may lawfully be conducted without judicial warrant and, if so, whether the government may use the fruits of such a surveillance in a criminal prosecution (Pet. 2, 14–17). The legality of the foreign intelligence surveillance involved in this case was neither raised in nor considered by the courts below. Nor is the government seeking "the use of its fruits" (Pet. 2) in this case, and neither court below had occasion to consider whether any such attempt would be proper. Rather, the courts ruled that, since the intercepted conversation had absolutely nothing to do with petitioners, with the attorney-client relationship, or with this case, petitioners lacked standing to gain access to the log or to have a hearing on its relevancy. Thus, even apart from the interlocutory nature of this petition, the lawfulness *vel non* of foreign intelligence electronic surveillance has no bearing on the orders petitioners now want the Court to review.

> Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause. These considerations of policy are especially compelling in the administration of criminal justice. * * * An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. * * *

These considerations apply with even greater force to preclude review of an evidentiary ruling, such as that here, made after the trial has begun and a jury empanelled. The havoc that would be wrought if criminal trials were stayed, while the parties proceeded to seek two levels of appellate review with respect to every objectionable ruling, is illustrated by what has already transpired here. Proceedings in the district court had been going on for some months. Finally, on July 10, 1972, the trial began with the process of selecting a jury. On July 21, 1972, a jury of twelve was empanelled and sworn, and on July 25, 1972, six alternate jurors were selected and sworn. By that time jeopardy had attached. See *United States* v. *Jorn,*

400 U.S. 470. Opening statements were scheduled for July 26, but the stays obtained by petitioners on July 26 and July 29 have held the trial in suspension for months and, if the writ is granted, the jurors will be held on a leash for many more months. This delay and attendant publicity have substantially increased the likelihood of a mistrial—for which petitioners have now moved (Pet. 5–6). If it becomes necessary to empanel a new jury because of this unnecessary interruption of the trial process, many weeks of the court's time as well as the time of counsel and of the jurors already selected, will have been wasted—and wholly unnecessarily wasted—since, as noted above, the question which petitioners seek to raise remains fully available to them on ordinary appellate review.

The disruptive consequences of petitioners' efforts to seek interlocutory review clearly confirm the validity of Mr. Justice Frankfurter's observation that "[f]or purposes of appellate procedure, finality * * * is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system." *Cobbledick* v. *United States, supra,* 309 U.S. at 326.[6]

[6] Contrary to petitioners' assertion (Pet. 6) that they are in a unique position facing a trial without knowing the details of an electronic surveillance, there is nothing unique about such a status. Allegations that evidence has been tainted by allegedly illegal electronic surveillance have been made in a number of criminal trials. These claims have been treated differently from other suppression applications to the extent that consideration of them has generally been delayed until *after* trial when it becomes clear what evidence the prosecution has relied upon and when the relevance of the wiretap can be more adequately

This long-settled and well-founded policy against interlocutory appeals in criminal cases is so firm that Congress has authorized only narrow exceptions to it. Thus, Congress has authorized the government to appeal interlocutory orders suppressing or excluding evidence, but only because such rulings would not otherwise be subject to review, and has permitted such review only upon certification that the appeal is not taken for delay and that the evidence is a substantial proof of a material fact. See 18 U.S.C. 3731. Compare 28 U.S.C. 1292. In the present case, by contrast, petitioners can preserve their objection to the district court's rulings for appeal from a judgment of conviction—unless, of course, the issue is mooted by dismissal of the charges or acquittal.[7] And substantial delay in the criminal process has been caused despite the explicit findings of the courts below that the information to which petitioners are demanding access is completely immaterial to the prosecution and to their constitutional interests.

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determined. See, *e.g.*, *United States* v. *Birrell*, 269 F. Supp. 716–717 (S.D.N.Y.); *United States* v. *Cole*, 325 F. Supp. 763 (S.D.N.Y.), affirmed, Nos. 72–1075–1075, June 6, 1972 (C.A. 2). Indeed, petitioners are in a more favorable position than many defendants who raise eavesdropping claims because they have already secured rulings that there has been no overhearing affecting them, their case, or their constitutional rights.

[7] This distinguishes the present case from the situation in *United States* v. *United States District Court*, *supra*, where the government sought mandamus from the court of appeals because that was the only method by which it could obtain appellate review of the district court's pre-trial order directing disclosure of the electronic surveillance.

In addition, the provision for government appeals of suppression orders is expressly made inapplicable to orders "made after the defendant has been put in jeopardy". 18 U.S.C. 3731. Thus, even though the government would have no other opportunity for securing review of the decision, and even if the prosecution would otherwise fail, Congress has adhered to the sound policy that, once the trial has begun, it should proceed without interruption by interlocutory appeals. Apart from the double jeopardy values thereby protected, that policy embodies a principle of sound judicial administration that is equally applicable to rulings the defense wants reviewed by appellate courts during trial.

2. Petitioners may not resort to the extraordinary writ of mandamus to circumvent the fundamental policy considerations which preclude appellate review at this time. "The extraordinary writs * * * may not be used to thwart the congressional policy against piecemeal appeals." *Parr* v. *United States*, 351 U.S. 513, 520–521; *Will* v. *United States*, 389 U.S. 90, 96–97. Moreover, considerations of policy aside, it is settled law that mandamus may not be employed to correct mere errors or even gross errors which do not amount "to a 'judicial usurpation' of power." *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382–383. The Court explicitly held in *Will* (389 U.S. at 98): "this Court has never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal." Yet it is the procedure followed by the district court

that petitioners want reviewed by mandamus. As Chief Judge Friendly recently explained in *United States* v. *DiStefano*, Nos. 72–1268, 72–1442, July 17, 1972 (C.A. 2, slip op., p. 4189):

> *Will* v. *United States*, 389 U.S. 90, 95, 104 (1967), makes plain that mere error, even gross error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, does not suffice to support issuance of the writ. "While the courts have never confined themselves to an arbitrary and technical definition of 'jurisdiction,' it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy . . . Mandamus, it must be remembered, does not 'run the gauntlet of reversible errors.' *Bankers Life & Cas. Co.* v. *Holland*, 346 U.S. 379, 382 (1953). Its office is not to 'control the decision of the trial court,' but rather merely to confine the lower court to the sphere of its discretionary power. *Id.*, at 383."

3. We, of course, do not concede that any error was committed by the district court in making its determination on the basis of an *in camera* inspection of the log of the wiretap.[8] As the courts below ruled, the threshold question where a claim of electronic surveillance is raised is one of standing. Petitioners place their primary reliance on *Alderman* v. *United States*, 394 U.S. 165 (see Pet. 6–11), but that reliance is misplaced. That case involved extensive electronic surveil-

[8] A copy of the log has been lodged with the Clerk of the Court.

lance of the defendants themselves, and thus they clearly had standing to litigate the legality of the overheading and, as the Court held, its relevance to the prosecution against them.

The present case, however, involves a single conversation, not of petitioners, but of one of their lawyers or consultants. It comes within the holding of *Taglianetti* v. *United States*, 394 U.S. 316, 317, where the Court said: "Nothing in *Alderman* * * * requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance." The issue there was whether the defendant had actually been overheard and thus had standing to complain, and the Court held that the proper procedure to resolve that preliminary, although possibly controlling question, was an *ex parte, in camera* review of the surveillance logs: "Under the circumstances presented here, we cannot hold that 'the task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court'" (394 U.S. at 317–318).*

Similarly, in *Giordano* v. *United States*, 394 U.S. 310, 313, the Court held that a determination of the lawfulness of a surveillance "would make disclosure [of the logs] and further proceedings unnecessary."

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* Accord: *United States* v. *Scalo*, 461 F. 2d 345 (C.A. 7); *United States* v. *Kane*, 450 F. 2d 77, 82 (C.A. 5), certiorari denied *sub nom. Sklaroff* v. *United States*, 405 U.S. 920; *Jones* v. *United States*, 443 F. 2d 822 (C.A. 9); *United States* v. *Battaglia*, 410 F. 2d 279 (C.A. 7), certiorari denied, 396 U.S. 848; *United States* v. *Hoffa*, 426 F. 2d 1213 (C.A. 7), certiorari denied, 400 U.S. 1000.

As Justice Stewart pointed out in his concurring opinion, that determination can appropriately be made *ex parte* and *in camera* by the district court (394 U.S. at 314).

In the present case, under *Taglianetti*, the district court properly ruled *ex parte* that no Fourth Amendment interests of the petitioners were involved by the overhearing of someone else at a location in which they had no interest. And although the court did not rule *ex parte* on the legality of the surveillance under the Fourth Amendment, as authorized by *Giordano*, it did rule that there was not even a possible violation of the Sixth Amendment right to counsel. We see no reason why that threshold question, any more than a Fourth Amendment determination, must be made in an adversary hearing. On the contrary, the interests of the government and of third parties in the confidentiality of such interceptions, as recognized in *Taglianetti* and *Giordano*, made it quite appropriate for the district court to ascertain *ex parte* and *in camera* whether the interception related in any way to petitioners or their representation by counsel. Having determined categorically that there is no possible relationship of the conversation to anything petitioners may be legitimately interested in, the court correctly ruled they lacked standing to examine the log.[10]

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[10] In this criminal proceeding, of course, the only rights that are to be litigated are those of petitioners, the defendants on trial. Alleged violation of any rights of their counsel or consultants that do not bear on this case should not be engrafted onto this criminal trial.

In any event, the most that could possibly be claimed here is that the district court "erred in ruling on matters within * * * [its] jurisdiction. The extraordinary writs [however] do not reach to such cases * * *." *Parr* v. *United States*, *supra*, 351 U.S. at 520. To the extent there is any occasion for post conviction appeals, the issue can be properly and adequately preserved for review at that time.

CONCLUSION

Petitioners acknowledge the "unprecedented" posture of the case (Pet. 5). They do not challenge the validity of the principles which preclude appellate review of interlocutory orders. Nor do they question the applicability of those principles to this criminal case. Under these circumstances, we respectfully submit the petition for a writ of certiorari should be denied.

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Supreme Court of the United States

October Term, 1972

ANTHONY JOSEPH RUSSO, JR. and DANIEL ELLSBERG,
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No. 72-307

Supreme Court of the United States

October Term, 1972

ANTHONY JOSEPH RUSSO, JR. and DANIEL ELLSBERG,
Petitioners,

vs.

WM. MATTHEW BYRNE, JR., Judge of the United States District Court for the Central District of California,
Respondent.

PETITIONERS' REPLY

The Government's Brief in Opposition seeks to portray this case as an attempt to appeal an order of minor importance made within the scope of a trial judge's discretionary authority. In fact, however, the case involves a usurpation of power by the district court in defiance of this Court's ruling in *Alderman* v. *United States*, 394 U.S. 165, raising novel issues of fundamental constitutional and practical importance which this Court recognized in *United States* v. *United States District Court*, 407 U.S. 297, as requiring resolution.

I

The Government's brief is essentially a cross-petition for certiorari to review the propriety of the exercise of mandamus jurisdiction by the court below.

The Government's Brief in Opposition rests primarily on the position that the final judgment rule should bar interlocutory review of the trial judge's order by way of

mandamus. So clear is this, according to the Government, that certiorari to consider the substantive issue should be denied. Yet neither Mr. Justice Douglas, in granting the stay which permits petitioners to bring the substantive wiretap issue before this Court, nor the Ninth Circuit panels which stayed the trial proceedings and then reviewed the merits of the wiretap question, accepted this position. Although the Ninth Circuit rejected petitioners' arguments regarding the wiretap issue on the merits, it implicitly assumed the power to decide those questions pursuant to its mandamus jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a). Similarly, Justice Douglas, although acknowledging the force of the final judgment rule in ordinary cases, recognized his power to disregard it in extraordinary circumstances, noting:

> "I am exceedingly reluctant to grant a stay where the case in a federal court is barely underway. But conscientious regard for basic constitutional rights guaranteed by the Fourth and Sixth Amendments makes it my duty to do so." *Russo* v. *Byrne*, Opinion of Circuit Justice Douglas, No. A-150 (July 29, 1972).

The actions of the Court of Appeals and of Mr. Justice Douglas establish a flexible mandamus rule, consistent with several other circuits, *infra* p. 4, which constitutes the law of the Ninth Circuit unless this Court decides to review the question by treating the Government's brief as a cross-petition for certiorari. According to this rule, mandamus may be appropriately employed to review district court decisions which constitute a clear abuse of discretion, a usurpation of power, or a decision upon a novel and important question, early resolution of which will contribute to the efficient administration of justice [See the discussion of the criteria for mandamus in *In re Ellsberg*, 446 F. 2d 954, 956 (1st Cir. 1971)]. All three criteria for mandamus are met in this case.

The Government's argument, framed in the language of *Parr* v. *United States*, 351 U.S. 513, assumes the most rigid application of the final judgment rule to each case.[1] It totally ignores subsequent decisions of this Court in which such a formalistic approach to mandamus was rejected in favor of a more flexible and discretionary framework. In those cases, the Court has recognized that while the final judgment rule usually promotes efficiency, it does not always do so. Thus its rigid application is moderated in those extraordinary cases in which interlocutory review will promote efficiency and prevent injustice. See 9 *Moore's Federal Practice*, (2d Ed. 1972), ¶ 110.26, p. 276.

Thus, in *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, decided only six months after *Parr*, the Court recognized the discretionary power of courts of appeals to issue interlocutory writs of mandamus when they have potential jurisdiction over the issues raised:

> "Since the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them." 352 U.S. at 255.

The Court went on to note that use of the discretionary power is proper "in exceptional circumstances" where the

[1] The "final judgment" decisions of this Court cited by the Government are not only radically different from the instant one, but contain explicit tempering of the language cited by the Government. Thus, *Cobbledick* v. *United States*, 309 U.S. 323, was an *appeal* from orders denying motions to quash grand jury subpoenas; there, Mr. Justice Frankfurter expressly left open the issue of appealability where constitutional rights might otherwise not be protected. 309 U.S. at 328-329. *Cogen* v. *United States*, 278 U.S. 221, was an appeal from an order denying a motion for the return of documents; there, Mr. Justice Brandeis expressly recognized the distinction between such an appeal and plenary proceedings such as the instant one. 278 U.S. at 225-226. *Will* v. *United States*, 389 U.S. 90, was a Government attempt to review by mandamus a district court order granting a bill of particulars—clearly a matter within its power. *Parr* v. *United States*, 351 U.S. 513 (with four dissents) was es-

district court's action constitutes a usurpation of power, or in exercise of the circuit court's "supervisory control of the District Courts" to insure "proper judicial administration in the federal system." *Id.* at 259-260. Subsequently, in *Schlagenhauf* v. *Holder*, 379 U.S. 104, the Court upheld the use of the mandamus jurisdiction to decide "basic undecided questions" and "to settle new and important problems." *Id.* at 110-111.

Several courts of appeals have read these decisions as permitting immediate review of unusual or important questions, even in interlocutory situations, when in their discretionary judgment the interests of efficiency and justice so demand. See, *e.g.*, *In re United States*, 348 F. 2d 624 (1st Cir. 1965); *International Investment Properties Int'l, Ltd.* v. *I.O.S., Ltd.*, 459 F. 2d 705 (2d Cir. 1972); *Rapp* v. *Van Dusen*, 350 F. 2d 805 (3d Cir. 1965); *United States* v. *Hughes*, 413 F. 2d 1244 (5th Cir. 1969), *vacated* as moot, 397 U.S. 93; *United States* v. *United States District Court*, 444 F. 2d 651, 655-656 (6th Cir. 1971); *Atlass* v. *Minor*, 265 F. 2d 312 (7th Cir. 1959). By proceeding as it has in the instant case, the Ninth Circuit has similarly aligned itself.[2]

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sentially an attempt to review the Government's selection of venue. In *Banker's Life & Casualty Co.* v. *Holland*, 346 U.S. 379, mandamus was sought to vacate a severance and transfer order in a civil suit. Justice Frankfurter in dissenting from the Court's consideration of the case left open the propriety of mandamus review "where postponement of review would involve a protracted trial, entailing heavy costs and great inconvenience." 346 U.S. at 388. So here.

[2] While the *La Buy-Schlagenhauf* doctrine of interlocutory mandamus jurisdiction is substantially reflected in circuit court opinions, problems of application to specific fact situations have produced a variety of results. Compare, *e.g.*, *In re United States*, *supra* (1st Cir.) (Mandamus appropriate to correct a district court order permitting a criminal defendant to take depositions of prospective government witnesses); *Miller* v. *United States*, 403 F. 2d 77 (2d Cir. 1968) (Mandamus appropriate to challenge district court action enjoining inquiries of jurors in a criminal case); *In re Ellsberg*, 446 F. 2d 954 (1st Cir. 1972) (Mandamus "arguably" appropriate to challenge district court order denying disclosure of electronic surveillance in a removal proceeding); *United States* v. *Di Stefano*, Slip Op. Nos. 72-1268, 72-1442 (2d Cir. July 17, 1972) (Mandamus would not lie to challenge a trial judge's dismissal of an indictment for failure to prosecute in a timely fashion); *United States* v. *Hughes*, *supra* (Mandamus appropriate to challenge trial court denial of discove

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The Government, citing *Will* v. *United States*, 389 U.S. 90, erroneously argues for a more rigid restriction upon mandamus in all criminal cases. But *Will* involved a restriction upon the Government's right—not the defendant's right—to mandamus in a criminal case because of the latter's constitutional rights to a speedy trial and to protection against double jeopardy. Indeed, the *Will* Court explicitly refused to rule out the use of mandamus in all criminal cases, and reaffirmed the doctrines of *La Buy* and *Schlagenhauf* even in a criminal context. *Id.* at 97, 107 n. 56. As Justice Black stated in his concurring opinion, 389 U.S. at 108:

> "I agree that mandamus is an extraordinary remedy which should not be issued except in extraordinary circumstances. And I also realize that sometimes the granting of mandamus may bring about the review of a case as would an appeal. Yet this does not deprive a court of its power to issue the writ. *Where there are extraordinary circumstances, mandamus may be used to review an interlocutory order which is by no means 'final' and thus appealable under federal statutes.*" (Emphasis added.)

The decisions of the Court of Appeals and of this Court in *United States* v. *United States District Court, supra,* appear to confirm the use of mandamus for the review of an interlocutory order in criminal cases. In that case the Government had a statutory right to appeal an order

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motions in a criminal case); *Ross* v. *Sirica*, 380 F. 2d 557 (D.C. Cir. 1967) (Mandamus appropriate to require district court to hold a post-indictment preliminary hearing for discovery purposes); *Lefton* v. *City of Hattiesburg*, 333 F. 2d 280 (5th Cir. 1968) (Mandamus appropriate to require a district court to admit an out-of-state attorney to defend a criminal defendant); *United States* v. *Dooling*, 406 F. 2d 192 (2d Cir. 1969) *cert. den. sub. nom., Persico* v. *United States*, 395 U.S. 911 (1969) (Mandamus appropriate to challenge trial court's post-trial dismissal of indictment); *United States* v. *United States District Court, supra*, 444 F. 2d 651 at 655-656 (Mandamus appropriate to challenge trial court's order requiring disclosure of logs of unlawful electronic surveillance).

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suppressing the wiretap evidence as illegal. 18 U.S.C. 2518(10)(b).[3] Instead of waiting for such a final judgment to pursue its statutory right of appeal, the Government sought interlocutory review through mandamus of an earlier order, namely the order to disclose. The Court of Appeals approved this action under the *Schlagenhauf* doctrine, 444 F. 2d at 655, 656, and this Court affirmed that approval, 407 U.S. at 301 n. 3, thus setting its seal of approval upon mandamus review of an interlocutory order.

Moreover, no case in the *La Buy-Schlagenhauf* line has diminished the traditional power of courts of appeals to issue mandamus as a means of controlling a district court's usurpation of power or gross abuse of discretion:

> "[W]hen a court has judicial power to do what it purports to do—when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of . . . [the All Writs Act]." *De Beers Consolidated Mines* v. *United States*, 325 U.S. 212, 217.

See, *e.g.*, *Buffington* v. *Wood*, 351 F. 2d 292, 294 (3d Cir. 1965); *Grace Lines, Inc.* v. *Motley*, 439 F. 2d 1028 (2d Cir. 1971). And *cf.*, *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (Mandamus inappropriate because petition raised only issues within admitted discretionary power of trial court). As shown, *infra* p. 9, the district judge in the instant case usurped the power to decide the issue of

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[3] 18 U.S.C. § 2518 (10)(b) reads:

> "In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted."

relevance himself in an *ex parte in camera* proceeding, contrary to the holding of this Court in *Alderman* v. *United States, supra.*

Thus, it is evident that the issue of when mandamus is appropriate is much more complex than the Government's brief indicates, and that the Ninth Circuit in the present case acted within the scope of its discretionary authority as established by the decisions of this Court. Even if the Court were disposed to revert to a rigid adherence to the final judgment rule in all criminal cases, the Government's argument would still be misdirected. Denial of certiorari would have no effect either in elucidating this confused procedural area or even in establishing precedent for future cases. Rather, to the extent that the mandamus question is a relevant issue here, the appropriate course would be to grant certiorari not only on the substantive wiretap issue but also on the procedural mandamus question as well.

Indeed, this case, in its present posture, is ideal for such consideration by this Court for the very reason that the Court need not be concerned with the burdens usually occasioned by a delay in a criminal trial. The petitioners' rights to a speedy trial are not at issue since it was the petitioners who sought appellate review. There is no further problem of "keeping the jury on leash." Regardless of this Court's action on the petition, the present jury must be discharged because three months have now elapsed since its selection and its dispersal into the community (See the Gov't's motion to vacate the stay granted by Mr. Justice Douglas, p. 9). There is no double jeopardy problem (assuming that there ever was one, see *Jorn* v. *United States,* 400 U.S. 470). Petitioners have filed an affidavit waiving double jeopardy when a new jury is selected. The Government has not suggested any further burdens which would arise from a grant of certiorari. Indeed, after seeking to convene this Court in Special Term, it waited until the last day

possible (fifty days after the filing of the petition for certiorari) to file its opposition herein, and has made no motion for expedited consideration by the Court. Finally, it is the Government which was responsible for precipitating the wiretap issue in the awkward posture in which it was initially framed. The Government complied with the District Court's discovery order in an extremely evasive manner months after the issuance of the discovery order, waiting until the jury had been impanelled before admitting the existence of the wiretapping. This is not the place to rebut in detail the Government's elaborate apology for its last minute compliance with electronic surveillance discovery (Gov't. Br. pp. 2-7), except to note that at no point does the Government suggest that it did not acquire the wiretap information until July 21.[4] Indeed the inference from the facts is strong and undenied that government counsel sat with the relevant wiretap information at hand for a considerable time prior to the impanelling of the jury.[5]

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[4] The Government has admitted that it began to search for interceptions of attorneys' conversations on or about May 10. (See Affidavit of Warren P. Reese, Supporting Motion for Modification of Order Requiring Investigation and Disclosure Regarding Electronic Surveillance, pp. 12-14 (filed May 20, 1972).)

[5] The problem of the Government's good faith in meeting its responsibilities to answer inquiries regarding electronic surveillance has arisen in many cases. A strikingly similar situation developed in *In re Tierney & Reilly*, Slip Op. Nos. 72-2333, 72-2399 (5th Cir. 1972), where the Government at first denied surveillance in a vague and incomplete manner, only to admit to the Court of Appeals that it indeed *had* overheard an attorney's conversation. In a number of other cases, Government denials of surveillance were *rejected* as too vague; the Government was either directed to submit to a remand "for a factual determination on the alleged use . . . of illegal electronic eavesdropping," *In re Brown*, No. 72-1914 (9th Cir. July 21, 1972), or to "unequivocably affirm or deny the employment of electronic eavesdropping." *In re Stavins*, No. 71-201; *In re Falk*, No. 71-165; *In re Chomsky*, No. 72-4; (D. Mass. Jan. 20, 1972). And in several other cases, the courts disapproved of the manner by which the Government denied surveillance, although refusing to hold that such denials were insufficient as a matter of law. *In re Horn*, 458 F. 2d 468 (3d Cir. 1972); *In re Beverly*, No. 72-2752 (5th Cir. 1972).

II

Ex parte in camera review of the relevance of a foreign intelligence wiretap of defense counsel is so serious a threat to the administration of criminal justice as to require review by mandamus.

A. The Government contends that "the threshhold question where a claim of electronic surveillance is raised is one of standing," (Gov't. Br. p. 13) and cites *Taglianetti* v. *United States,* 394 U.S. 316, 317, for the proposition that the question may be determined by an *ex parte, in camera* review of the surveillance logs. But, as the Government itself admits, the issue in *Taglianetti* was "whether the defendant had actually been overheard" at all. (Gov't. Br. p. 14). The *in camera* review permitted there related to the *identity* of the individual whose voice was recorded, not to the relationship of the contents of the recording to the issues in the case.[6] Likewise the Government's reference to *Giordano* v. *United States,* 394 U.S. 310, (Gov't. Br. pp. 14-15) is inapposite, since *Giordano* did not involve the district court in a consideration of the *content* of the tap, whereas this case, like *Alderman,* requires an adversary hearing on content to determine relevance.

Here, the Government has admitted overhearing the conversation of a member of the defense team in the course of a warrantless foreign intelligence tap. Thus, the question of standing to raise the issue of relevance has already been settled (See Petition, pp. 8-13).

B. Fundamental to the entire posture of this case is the admitted surveillance of a defense lawyer or a member

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[6] In each of the cases cited in footnote 9 of the Government's brief, *in camera* review was permitted only to determine the identity of the voices overheard. In no case was the *in camera* review directed at determining the relation of the *contents* of the conversation to the facts and issues of the case. Thus, the cases were well within the *Taglianetti* holding and are no more controlling here than in *Taglianetti* itself.

of the defense team. Defense counsel cannot be expected to proceed to trial with full vigor while under an unresolved cloud of illegal electronic surveillance. Moreover, disclosure in adversary proceedings protects the courts against the impression that they are involved in the "dirty business" (*Olmstead* v. *United States*, 277 U.S. 438, 470, dissenting opinion of Mr. Justice Holmes) of wiretapping defense counsel, an impression that would not be undone by an acquittal of the defendants or by appellate resolution of the main issues. The evil is compounded where the Government, as here, makes secret submissions not only to the district court, but to the Court of Appeals and to this Court, as if the Attorney General had a different relationship with the Court than defense counsel. Hence, Mr. Justice Douglas rightly followed the example of Mr. Justice White in another wiretapping case, *United States* v. *United States District Court, supra*, 407 U.S. at 343, in declining to look at the secret wiretap log.

Review by mandamus is essential here to the administration of criminal justice, in view of the increasing government surveillance of defense counsel. That issue has just been presented to this Court by a petition for certiorari in *In re Tierney*, 72- ...., bail having been granted by Mr. Justice Douglas (Nos. A49 and A80, September 12, 1972). See also *United States* v. *Seale*, 461 F. 2d 345 (7th Cir. 1972); *United States* v. *Brown*, 317 F. Supp. 531 (E.D. La. 1970); *In re Beverly, supra*.

Situations in which there is threatened interference with Sixth Amendment rights to effective assistance of counsel and to a fair trial have been considered especially appropriate for extraordinary relief. Mandamus or injunction has been the usual remedy to correct the actions of the trial court. Thus, in *Laughlin* v. *Eichler*, 145 F. 2d 700 (D.C. Cir. 1944), the D.C. Circuit considered on its merits a petition for mandamus challenging the trial court's removal of a defense lawyer in the course of a criminal trial. In *Lefton* v. *City of Hattiesburg*, 333 F. 2d 280 (5th Cir.

1968), a trial court was required to admit an out-of-state lawyer to practice to defend civil rights criminal defendants. (The proceeding was in the nature of mandamus, although the Circuit Court was reluctant to name the trial judge as defendant, believing that he really did not mean to bar the lawyer from practice. The court made clear, however, that if the trial judge did indeed persist in denying the lawyer admission, a mandamus order would issue.) See also *Sanders* v. *Russell,* 401 F. 2d 241 (5th Cir. 1968); *Cooper* v. *Hutchinson,* 184 F. 2d 119 (3rd Cir. 1950) (Injunction would lie against a state judge who unlawfully interfered with a defendant's choice of out-of-state counsel.)

C. The underlying issue in this case of the legality of warrantless[7] foreign intelligence electronic surveillance is also appropriate for review by mandamus. This issue was explicitly left open by the Court in its recent opinion in *United States* v. *United States District Court, supra.* Like the "domestic security" issue decided in that case, the "foreign intelligence" question "is a matter of national concern, requiring sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion." 407 U.S. at 299. An authoritative statement by the Court is required to clear up the uncertainties and ambiguities on the subject that exist among citizens, courts, and law enforcement officials.

Such a statement is urgently required due to the Government's recognition on the one hand that there really is little difference in practice between warrantless "foreign intelligence" and "domestic security" surveillances,[8] and

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[7] In *Gelbard* v. *United States,* 408 U.S. 41, Mr. Justice White, concurring, suggested that a different rule might apply in a grand jury case "[w]here the Government produces a court order for the 'interception' ". No such order was secured in the instant case.

[8] See Brief for the United States in the *United States District Court* case, pp. 29-31, 34. See also, Reply Brief for the United States, pp. 8-9.

its insistence, on the other hand, that it will continue to engage in the former practice despite the Court's opinion declaring the latter to be unlawful. This raises the real possibility that the Court's landmark decision in *United States District Court* will be undermined by what may well be only a semantic distinction on the part of the Government. (See the opinion of Justice Douglas granting the stay in the instant case.) Indeed, the Government suggested that the tap in the *United States District Court* case itself could have been characterized as a foreign intelligence surveillance. See Brief of the United States in *United States* v. *United States District Court*, pp. 30-31, n. 13.

That the issues raised by national security surveillance —of both the "domestic" and "foreign" variety—are of great public controversy and practical importance need hardly be emphasized. In the past several years, in virtually every criminal prosecution of political dissidents, and in virtually every grand jury proceeding investigating such dissidents, questions of the existence, extent and legality of government wiretapping or bugging have been of central concern.[9]

The scholarly legal commentary on the issues raised by electronic surveillance has been extensive, having increased in proportion to the increase in litigation resulting from the use of the fruits of such surveillance in criminal investigations and prosecutions. Much of the commentary has focused upon the subject of national security wiretapping and bugging, and has generally viewed the Justice Department's assertion of inherent power with disfavor. See *e.g.*, Comment, *Privacy and Political Freedom: Applications of the Fourth Amendment to "National Security" Investigations*, 17 U.C.L.A. L. Rev. 1205 (1970); *Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1244-1270

[9] See the cases collected in Appendix A to this brief for a summary of the disposition of the wiretap issues.

(1972); Schwartz, *The Legitimation of Electronic Surveillance: The Politics of "Law and Order"*, 67 Mich. L. Rev. 455 (1969); Theoharis and Meyer, *The "National Security" Justification for Electronic Eavesdropping: An Elusive Exception*, 14 Wayne L. Rev. 749 (1968); Comment, *The "National Security Wiretap": Presidential Prerogative or Judicial Responsibility*, 45 S. Cal. L. Rev. 888 (1972); Spritzer, *Electronic Surveillance By Leave of the Magistrate: The Case in Opposition*, 118 U. of Pennsylvania L. Rev. 169 (1969); Note, *Eavesdropping at the Government's Discretion—First Amendment Implications of the National Security Eavesdropping Power*, 56 Corn. L. Rev. 161 (1970); Comment, 5 Valparaiso U.L. Rev. 561 (1971); Comment, 46 N.Y.U. L. Rev. 1193 (1971); Note, 17 Vill. L. Rev. 175 (1972); Comment, 60 Ky. L.J. 245 (1971); 1972 Wisc. L. Rev. 175 (1972); Navasky, *Kennedy Justice* (1972).

A significant number of such cases have involved issues of foreign intelligence gathering which have not been reached because of the presence of the domestic security issues.[10]

Concern about Government electronic surveillance practices has not been confined to the judiciary. Recent hear-

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[10] See, for example, *United States* v. *Dellinger*, No. 60 Cr. 180 (N.D. Ill., June, 1969); *United States* v. *Hilliard*, No. 69-141 Crim. (N.D. Calif. 1971); *United States* v. *Rudd*, No. 45119 (E.D. Mich. 1971); *United States* v. *Ahmad*, Crim. No. 14950 (M.D. Pa. 1972); *United States* v. *Hoffman*, No. 973-71 (D.D.C. Nov. 23, 1971); *United States* v. *Bacon*, No. 71 Crim. 687 (S.D.N.Y. 1971). In several of these cases, the confusion as to whether the wiretapping concerned "domestic" or "foreign" intelligence gathering was created by the vague terms in which the government affidavits admitting surveillance were framed. In the following cases, issues of foreign intelligence electronic surveillance were directly decided, *United States* v. *Clay*, 430 F. 2d 165 (5th Cir. 1970); *United States* v. *Brown*, 317 F. Supp. 531 (E.D. La. 1970); *United States* v. *Butenko*, 318 F. Supp. 66 (D.N.J. 1970); *United States* v. *Stone*, 305 F. Supp. 75 (D.D.C. 1969), the issue still remaining one for this Court.

ings before Senator Ervin's Constitutional Rights Subcommittee of the Senate Judiciary Committee focused upon the effect of surveillance practices of all kinds upon the Bill of Rights. Senators and witnesses expressed a growing concern about the Government surveillance practices, including wiretapping and bugging, and the threat that such practices poses to constitutional liberties. See Hearings, *Federal Data Banks, Computers, and the Bill of Rights*, February 23-25, March 2-4, 9-11, 15, 17, 1971, pp. 27, 54, 56, 85, 88 and *passim*. The extension of such wiretapping by former if not present government officials into the current presidential campaign is only the latest incident in a pattern of eavesdropping requiring this Court's consideration.[11]

The foreign intelligence issue was not reached by the lower courts in the instant case because they erroneously concluded that petitioners lacked standing to raise it. The Government's contention that the issue does not exist is misleading; should this Court uphold petitioners standing to challenge the surveillance, the Government will claim that its actions were lawful under the inherent power doctrine by which the Attorney General authorized the wiretaps. Because the issue is inseparable from the case and is of fundamental importance, the Court should consider it together with the standing—relevance issues in granting certiorari. See *Schlagenhauf* v. *Holder, supra*, 379 U.S. at 111-112, *Black* v. *United States*, 385 U.S. 26; *O'Brien* v. *United States*, 386 U.S. 345.

In *Schlagenhauf*, for example, the Court found that the Court of Appeals, in addition to considering one of the issues raised by the petition for mandamus, also should have considered a related second issue "so as to avoid piecemeal litigation and to settle new and important prob-

[11] See, *e.g.*, *More Fumes from the Watergate Affair*, Time Magazine (Oct. 23, 1972), p. 23, which reveals further illegal action by the Watergate wiretappers against the petitioner Ellsberg.

lems." 370 U.S. at 111. Rather than remand to the Circuit Court, however, the Court held that the very importance of the issue made it "appropriate for us to determine on the merits the issues presented and to formulate the necessary guidelines in this area." 379 U.S. at 112.

Similarly, in the *Black* and *O'Brien* cases, where issues of electronic surveillance first arose upon the Solicitor General's admissions in this Court, the Court refused to remand for adversary hearings on taint and relevance. Rather, the Court determined that on the merits the convictions must be vacated and new trials ordered.

A parallel situation exists here for the resolution of the legality of the Government's admitted foreign intelligence wiretap upon a member of the defense team—an issue which the Court explicitly left open for future decision. Such review is essential because the Government's conduct poses most serious questions concerning the constitutional right of privacy, the independence of the Bar and the integrity of the judicial process.

CONCLUSION

The Petition for Certiorari should be granted.

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Name & No. of Case	Surveillance Initiated on	Tap of Defendant, Grand Jury Witness	Tap Involved	Dist. Ct. Disposition	Appellate Review	Any subsequent Action

Name of Case	Admitted or Denied	Defendant or Lawyer	Foreign Intell. Dom. Se. or Crim. Law			On Remand or Otherwise
1. United States v. Dellinger, USDC No. Ill. 6169 69 Cr. 180	Admitted	Defendant	Foreign Intelligence and domestic security	Post-trial 2/26/70 After in camera inspection, court found surveillance to be lawful and therefore required no disclosure	Pending, 7th Circuit Ct. of Appeals, No. 18295	
2. United States v. Seale, 461 F. 2d 345 (7th Cir. 1972) (contempt case; companion to United States v. Dellinger and In re Dellinger	Admitted	Lawyer (counsel team)	Domestic security	Based on in camera inspection of logs held (1) Seale had no standing to object, as taps did not involve his conversations, his premises or his lawyers. (2) No taint possible in summary contempt proceedings	7th Circuit. 5/11/72. Held (1) One of the overheard conversations might be a link in a communication from a lawyer to Seale advising him with respect to his conduct in court. Seale had standing to object to it. (2) The tap was without a warrant, and therefore unlawful. (3) The government must disclose the log of the conversation for use in an Alderman hearing, or dismiss the indictment for contempt	Government has refused to disclose the logs, and in accordance with the Seventh Circuit decision and the Court's opinion in United States v. U.S.D.C., has moved the District Court to dismiss the indictment. See New York Times, Sept. 28, 1972.

3. In re Ellsberg, 446 F. 2d 954 (1st Cir. 1971) Contempt Case	Admitted, but denied as to surveillance during trial of these defendants or their lawyers		Both	Same as in United States v. Seale	In camera review disclosed that these defendants lacked standing to object to any overheard conversations "possibly bearing" on contempt. Reversed on other grounds. 5/11/72	
4. United States v. Smith, USDC C.D. Calif., Crim. No. 4277-CD, 321 F. Supp. 424	Admitted to Court of Appeals upon appeal of conviction. Remanded to District Court in light of Alderman.	Defendant	Domestic security	1/8/71. Held that surveillance without warrant was unlawful. Required disclosure and an Alderman hearing. 30 day of order for government appeal	9th Cir. 6/22/71. "submission of above case is vacated pending decision of Supreme Court" in United States v. U.S.D.C.	
5. United States v. Sinclair et. al, U.S.D.C. E.D. Mich., No. 44373, 321 F. Supp. 1074.	Admitted	Defendant	Domestic Security	1/25/71 - D. Ct. holds surveillance is illegal and orders government to disclose information or dismiss indictment.	1. Government petitions for mandamus to Sixth Circuit Court of Appeals. Sixth Circuit holds that Dist. Ct. was correct in its holding that surveillance was illegal. Refuses to issue writ. 444 F. 2d 6. . . 2. U.S. Supreme Court affirms lower court decisions. 407 U.S. 297 (1972).	Government refuses to disclose and moves for dismissal. Dismissal granted. July 24, 1972.

Case	Admitted or Denied	Defendant, Witness or Lawyer	Foreign Intelligence, Dom. Sec. or Crim. Law			Dismissed or Otherwise
6. United States v. Hilliard, U.S.D.C. N.D. Calif. Case No. 69-141 Crim.	Admitted	Defendant	Foreign Intelligence and national security	5/4/71. Surveillance was unlawful under Fourth Amendment. Government must disclose or indictment will be dismissed. Indictment dismissed upon oral representation by U.S. Attorney that no disclosure will be made.		
7. United States v. Jaffe & Donghi, U.S.D.C. W.D. N.Y., CR 1970-81 (1/7/71)	Admitted	Defendant	Domestic Security	5/14/71 - D. Ct. finds surveillance unlawful and orders disclosure of surveillance records to defendant.	7/8/71. Denies without prejudice, petition for mandamus, pending disposition by Supreme Court of United States v. U.S.D.C. No dismissal or disclosure will be required pending that decision.	10/6/72. The Government orally moves for dismissal of the indictment.
8. United States v. Rudd, U.S.D.C. E.D. Mich. 9/19/71 95119	Admitted	Defendant	Vague. Seemingly both foreign intelligence and domestic security	Pending		

9. United States v. Iqbal Ahmed, U.S.D.C. M. D. Pa, Crim. No. 14950, 5/13/71	Admitted surveillance of two defendants (Glick and McAllister)	Defendant	Vague. Seemingly both foreign intelligence and domestic security.	11/12/71. District Court suppressed as illegal the overheard conversations of defendants. Issue of taint deferred until after trial.		
10. United States v. Jaffe & Beiber, E.D.N.Y. No. 71 Crim. 480 6/18/71	Admitted			Trial Court ordered disclosure to defendants for a determination of legality of the surveillance. Case resolved on other issue.		
11. United States v. Hoffman, D.D.C. No. 973-71 11/23/71	Admitted	Defendant	Foreign Intelligence and domestic security	11/23/71. 1. Defendant had standing to object to the taps; 2. The domestic security taps were illegal and must be disclosed prior to trial; 3. A "taint" hearing will be held after trial; 4. 12/8/71. District Court stayed its order and all proceedings pending decidion of U.S. Sup. Ct. in United States v. U.S.D.C., supra.		On July 27, 1972, Government moved to dismiss indictment. Motion granted on July 28, 1972.

	Denied	Witness or Lawyer	Dom. Sec. or Crim. Law			Action on Remand or Otherwise
12. United States v. Keen, S.D. N.Y. 71 Criminal 687	Admitted	Defendant	Foreign Intelligence and domestic security	Disposition and trial stayed pending decision in United States v. U.S.D.C. No action yet taken since.		
13. United States v. O'Neal, U.S.D.C. Kansas, KC CR. 1204 8/6/70	Admitted	Defendant	Domestic intelligence	Dist. Ct. held that taps were legal and no disclosure was required. 9/1/70		
14. United States v. Little, Crim. No. 50342-71 Sup. Ct. of D.C.	Admitted	Defendant	Domestic Security	Court denied motion for disclosure, holding taps were legal. 1/12/72		Indictment dismissed subsequent to U.S.D.C. opinion, 7/6/72
15. United States v. Clay, S.D. Tex. Ct. No. 67-11-94	Admitted	Defendant	Domestic Security and Foreign Intelligence	7/1h/69. 1. Ct. required disclosure of all but the foreign intelligence tap. After a hearing, Court found that they were not relevant to defendant's conviction. 2. Court held that the foreign intelligence tap was lawful and did not require disclosure.	430 F. 2d 165 (5th Cir. 1970. 1. Agreed that the disclosed taps were not relevant to defendant's conviction. 2. Examined in camera the foreign intelligence tap. After holding that it was lawful, the court also found that it was not relevant to defendant's	

	Admitted	Witness or Lawyer	Sup. Sec. or Crim. Law			Action on Remand or Otherwise
16. United States v. Brown, USDC E.D. La. Crim. No. 30966	Admitted	Defendant and Lawyer	Criminal Investigation and Foreign Intelligence taps	5/13/68. Dist. Ct. denied motion for disclosure, examined logs of taps in camera, and held that the taps were irrelevant to the issues of the case.	5th Cir. 4/13/69. Slip Op. #26249 - remanded to District Court for further proceedings in conformity with Alderman.	On 9/22/69, the Government disclosed to defendant the logs of the criminal investigation taps. District Court opinion of 7/24/70- 317 F. Supp. 531: 1. The disclosed logs were irrelevant; 2. The fact that the disclosed log revealed a tap of an attorney-client conversation did not require reversal where no taint was shown at a hearing; 3. Foreign intelligence taps were lawful, and need not be disclosed to defendant.
17. United States v. Butenko, U.S.D.C. D. N.J. Crim. No. 418-63	Admitted	Defendant	Foreign Intelligence	318 F. Supp. 66 (10/13/70). On remand from Sup. Ct., 394 U.S. 1651, District Court held that foreign intelligence taps were lawful and did not require disclosure to defendants.		

Case	Admitted or Denied	Grand Jury Witness or Lawyer	Foreign Intell., Non Sup., or Crim. Law			Action on Remand or Otherwise
18. United States v. Stone, USDC Crim. No. 1233-68	Admitted	Defendant	Foreign Intelligence	305 F. Supp. 75 (9/15/69). 1. Katz does not apply, because taps took place prior to that decision; 2. The taps were legal under Section 605 of the Federal Comm. Act. of 1934.		
19. United States v. Fox	Admitted	Defendant	Unclear whether domestic intelligence or criminal investigation	District Court examined in camera; determined no relevance to issues at trial.	5th Circuit - 455 F. 2d 131 (1972). Reversed and remanded for disclosure and an adversary hearing on relevance.	
20. United States v. Scott Camil et al., USDC N.D. Fla. GCR-1344	Government has not yet responded to defendants' motion of 9/14/72 to affirm or deny electronic surveillance			Pending		

	Denied	Witness or Lawyer	Dom Sec. or Crim. Law			Action on Remand or Otherwise
21. United States v. Gelbard	Admitted	Grand Jury Witness	Criminal Law Violations	Held that Grand Jury witnesses may not raise the issue of the legality of the surveillance as a ground for refusing to answer questions. Held witness who refused to answer in civil contempt.	9th Cir. Ct. of Appeals affirmed the contempt citations. 443 F. 2d 837 (1971). Supreme Court reversed, 92 S. Ct. 2357 (1972).	
22. In re Walsh and Egan	Government refused to either affirm or deny electronic surveillance	Grand Jury Witness	?	District Court held witnesses in contempt for refusing to answer questions. Court denied request that Government be required to affirm or deny fact of electronic surveillance	3rd Cir. en banc reversed citations, holding that witnesses could raise issue of whether questions of grand jury were fruits of illegal electronic surveillance. 450 F. 2d 199 (Egan) and 231 (Walsh)(1971). S. Ct. affirmed 92 S. Ct. 2357 (1972).	

Name & No. of case	Surveillance Admitted or Denied	Tap of Defendant, Grand Jury Witness or Lawyer	Tap Involved Foreign Intell., Dom. Sec. or Crim. Law	Dist. Ct. Disposition	Appellate Review	Any Subsequent Action on Remand or Otherwise
23. In re Evans, et al.	Government refused to either affirm or deny electronic surveillance	Grand Jury Witness	?	District Court held witnesses in contempt for refusing to answer questions. Court refused to order Government to affirm or deny fact of electronic surveillance	D. C. Cir. reversed 9/8/71, 452 F. 2d 1239. Held that witnesses could raise issue of whether questions asked were fruits of unlawful electronic surveillance. Government must affirm or deny its existence. Government petition for certiorari denied by S. Ct., 92 S. Ct. 2379 (1972).	
24. Dixon v. United States	Government refused to either affirm or deny electronic surveillance	Grand Jury witness	?	District Court held witness in contempt for refusing to answer questions	9th Cir. affirmed 8/9/71, 446 F. 2d 669 (1971). Order vacated by Supreme Court, 92 St. Ct. 2501 (1972).	
25. In re Brown, No. 72-1914 (9th Cir. July 21, 1972)	Denied	Grand Jury witness		Witness cited for contempt for refusing to answer questions of Grand Jury	9th Cir. order - 7/21/72 - reversed and remanded "for a factual determination on the alleged use by the Government of illegal electronic eaves-	

... & No. of case	Surveillance Admitted or Denied	Tap of Defendant, Grand Jury Witness or Lawyer	Tap Involved Foreign Intell., Dom. Sec. or Crim. Law	Dist. Ct. Disposition	Appellate Action	Action on Remand or Otherwise
26. In re Stavins, No. 71-201; 27. In re Falk, No. 71-165; 28. In re Chomsky, No. 72-4 (D. Mass, Jan. 20, 1972)	Denied in all three	Grand Jury Witnesses		1/20/72. District Court grants motions of witnesses to quash subpoenas on grounds that the Government affidavits failed to meet the requirements of 18 U.S.C. §3504(a)(1) in that they did not "unequivocably affirm or deny the employment of electronic eavesdropping. Motion granted without prejudice.	Government moved to dismiss its own appeal	Government has failed to submit a less equivocal denial.
29. In re Tierney, No. 72-2333 30. In re Reilly, No. 72-2399, 5th Circuit Court of Appeals	Denied, except admitted an overhear of an attorney pursuant to a court order under 18 U.S.C. 2518 (Government did not admit this until case had reached appeal	Alleged as to Grand Jury witnesses --- Admitted as to an attorney		District Court held that the denial of the surveillance was sufficient. Committed witnesses for civil contempt for failure to answer Grand Jury's questions.	Fifth Circuit (8/3/72) 1. Affirmed district court finding that denials were sufficient; 2. Reviewed in camera, the transcript of the overhear. Held: "It contains nothing of evidentiary substance, nor does it have to do with the right to counsel or the adequacy of representation by counsel. This incident does not afford a basis (Contd)	

& No. Case	Surveillance Admitted or Denied	Tap of Defendant, Grand Jury Witness or Lawyer	Tap Involved Foreign Intell., Dom. Sec. or Crim. Law	Dist. Ct. Disposition	Appellate Review	Any subsequent Action on Remand or Otherwise
Tierney & Reilly (Contd.)					(Contd) for the refusal of appellants to testify before the grand jury." Bail petition denied by Justice Powell. Bail petition granted pending submission of petition for writ of certiorari by Justice Douglas, 9/12/72 (Nos. A-49 and A-80): a. Despite grant of use immunity, attorney-client privilege still applies; b. important issue of whether there has been a violation of the Sixth Amendment right to counsel, despite the fact that a warrant issued prior to the tap; c. Important issue of whether relevance and taint may be determined by in camera proceeding in this context.	

& No. Case	Surveillance Admitted or Denied	Typ of Defendant, Grand Jury Witness or Lawyer	Typ Involved Foreign Intell., Dom. Sec. or Crim. Law	Dist. Ct. Disposition	Appellate Review	Any Subsequent action on Remand or Otherwise
31. In re Beverly, No. 72-2752, 5th Circuit Court of Appeals (9/25/72)	Denied Did not respond fully	Grand Jury Witnesses Attorneys		Upheld Adequacy of denials. Cited witnesses for contempt for failure to answer questions.	8/22/72. Bail pending appeal denied by Justice Powell. 8/31/72. Bail pending appeal granted by Justice Douglas because "there has emerged the troublesom question concerning electmaic surveillance of petitioner's attorneys in which I think a hearing is required. 9/25/72. Fifth Circuit vacates the contempt citations and orders the Government to affirm or deny whether it has overheard conversations of the witnesses' lawyers.	
32. In re Grumbles, U.S.D.C. D.N.J.	Denied			Upon refusal to testify, cited witnesses for contempt.	3rd Circuit Court of Appeals affirmed, holding the government's denial was sufficient. 453 F. 2d 119 (1971).	

Name & No. of case	Surveillance Admitted or Denied	Tap of Defendant, Grand Jury Witness or Lawyer	Tap involved Foreign Intell., Dom. Sec. or Crim. Law	Dist. Ct. Disposition	Appellate Review	Any subsequent action on Remand or Otherwise
33. In re Horn, U.S.D.C. M.D. Pa.	Denied			Upon refusal to testify, cited witnesses for contempt 3/3/72	3rd Circuit affirmed on the basis of Gruubles. 458 F. 2d 468 (3/14/72)	